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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 295

THOMAS M. DEBEVOISE, Attorney General of the State of Vermont, and STATE OF VERMONT,
Respondents,

v.

RUTLAND RAILWAY CORPORATION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: August 8, 1961

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IN THE

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No.

THOMAS M. DEBEVOISE, Attorney General of the State of Vermont, and STATE OF VERMONT,

Respondents,

v.

RUTLAND RAILWAY CORPORATION,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Rutland Railway Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered June 8, 1961, which reversed and remanded with instructions to remand to the Rutland County Court of Chancery, the order of the United States District Court for Vermont entered October 28, 1960, which order enjoined the State of Vermont and its agents from running the Rutland Railway Corporation under a purported State receivership. It was entered two days after the same court issued its findings of fact, conclusions of law and judgment order in *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Eng.*, 188 F. Supp. 721 (D. Vt., 1960).

Citations of Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (June 8, 1961) has not yet been reported officially. It is Appendix A hereto.[1] The opinion of the United States Court of Appeals for the Second Circuit granting Petitioner's motion to stay the issuance of the Mandate (July 11, 1961) has not yet been reported officially. It is Appendix B hereto. The order of the District Court of Vermont (October 28, 1960) has not been reported officially. It is Appendix C hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254(1) and 62 Stat. 961 as amended, 28 U.S.C. §2101(e).

Questions Presented

The questions presented are:

(1)(a) Whether or not the District Court for the District of Vermont had the power and authority ("in aid of its jurisdiction or to protect or effectuate its judgments" under 28 U.S.C. §2283) to stay the proceeding initiated in its State Court by the State of Vermont to force Petitioner into State receivership proceedings when: (i) a prior Federal proceeding covering the same subject matter was already at issue and set for hearing before the Federal Court; and (ii) the National Railroad Adjustment Board had already accepted Petitioner's submission of the same controversy to it under the provisions of the Railway

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1. References hereinafter to the "Appendix" are to the appendix to this petition; references to pages, i.e. p. 2a, are to the appendix record below, nine copies of which have been filed in accordance with paragraph 4 of Rule 21 of this Court.

Labor Act, 44 Stat. 577 as amended, 45 U.S.C. §151 *et seq.*; and

(b) Whether or not the Court of Appeals for the Second Circuit committed error in failing to consider the applicability of 62 Stat. 968, 28 U.S.C. §2283 to this proceeding.

(2)(a) Whether or not the District Court for the District of Vermont had jurisdiction (over the subject matter of the State's petition for receivership of the Petitioner) to remove the proceeding from the Vermont State Court under the Removability Statute, 62 Stat. 931, 28 U.S.C. §1441, because rights or immunities created by Federal law (the Constitution of the United States, Article I, Section 8, Clause 3, Regulation of Commerce; the Fourteenth Amendment, Section 1, Due Process of Law; the Interstate Commerce Act and the Railway Labor Act) were such that the cause of action, stated in the State's petition for receivership, would be supported if that Federal law was given one construction and defeated if it was given another construction; and

(b) Whether or not the Court of Appeals for the Second Circuit erred in holding that the District Court did not have jurisdiction to remove this proceeding.

(3) Whether or not the opinion of the Circuit Court of Appeals conflicts with the established policy of this Court to sustain the jurisdiction of District Courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the State to do.

(4) Whether or not the District Court for the District of Vermont correctly held that the State's receivership proceeding initiated a seizure of Petitioner's property

without due process of law by a governmental agency without any statutory or other authority under which it could have been authorized to take the action. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

(5) Whether or not, as a result of the foregoing, this proceeding presents to this Court important questions involving a conflict between Federal and State jurisdiction and the application of the Removability Statute, 62 Stat. 937, 28 U.S.C. §1441 and the Stay of State Court Proceedings Statute, 62 Stat. 968, 28 U.S.C. §2283 to that jurisdictional conflict.

Statutes Involved

The statutes involved are: Stay of State Court Proceedings Statute, 62 Stat. 968 (1948), 28 U.S.C. §2283; The Removability Statute, 62 Stat. 937 (1948), 28 U.S.C. §1441; Interstate Commerce Act, 49 Stat. 543 (1935), 49 U.S.C. §1 et. seq. (1887); Commerce and Antitrust Regulations, 62 Stat. 931 (1948), 28 U.S.C. §1337; Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. §151 et seq.; Constitution of United States, Art. I, Section 8, Clause 3; Regulation of Commerce and Constitution of United States, Fourteenth Amendment, Section 1, Due Process of Law. They are printed as Appendix E, *infra*.

Statement

Rutland Railway Corporation is a Vermont railroad corporation engaged in interstate commerce. It is regulated by the Interstate Commerce Commission and the Public Service Commissions of the States of Vermont and New York.

On September 16, 1960 at 12:01 A.M. the Rutland was forced to cease operation because of a strike instituted by its operating employees.

On September 26, 1960 the Rutland instituted an action against the striking unions, *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, Civil Action No. 3070 in the United States District Court for the District of Vermont. The relief sought in the complaint was to enjoin the strike as illegal, to compel compliance by its striking employees with the procedural requirements of the Railway Labor Act including submission of the controversy to the National Railroad Adjustment Board and for damages. This action will be hereinafter referred to as the "Injunction Action".

On September 29, 1960 the Rutland submitted the dispute which caused the strike to the National Railroad Adjustment Board established under the Railway Labor Act for adjudication by it. The Adjustment Board accepted the submission of the dispute on September 30, 1960.

On October 17, 1960 the Brotherhood of Locomotive Engineers, et al. filed their answer in the pending proceeding before the District Court for the District of Vermont. The Court had indicated it would hold hearings and reach a decision quickly.

On the same day, the Attorney General for the State of Vermont filed in the State Court an ex parte proceeding in which he sought a petition for receivership of the Rutland. That afternoon the Chancellor signed an order granting the relief requested by the Attorney General and appointed a receiver.

On October 18, 1960 the State-appointed receiver initiated and consummated a labor agreement with the striking unions (Appendix D hereto).

On October 19, 1960 the Rutland removed the receivership proceeding from the State Court to the District Court for the District of Vermont and obtained a temporary restraining order against the execution of the purported State receivership.

The same Court on October 20 and 21, 1960 held full and complete hearings on the Rutland's Federal Injunction Action which had been initiated on September 26, 1960.

On October 26, 1960, the same Federal Court held a full and complete hearing in connection with the issuance of its temporary restraining order against the State receivership. (pp. 22a-31a) The State moved to remand the proceedings to State Court. At that hearing, the Court stated that the State's seizure of the Rutland constituted a taking of private property without due process of law and also violated principles of comity. The essential cause of action had been presented first in the Injunction Action in the Federal Court and later in the State Court. It was indicated that a permanent injunction against the purported receivership would issue. Later that day, the United States District Court for the District of Vermont issued its findings of fact, conclusions of law and judgment order in the Injunction Action, *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng., supra.*

On October 28, 1960, two days later, the permanent injunction against the purported receivership of defendant was filed. It is that order which is the basis for the instant proceeding.

In September the Petitioner had filed its federal complaint in the Injunction Action. In October the State's petition for a receivership established on its face that Petitioner is a railroad which operates in Vermont and New York, i.e., in interstate commerce. It also shows that the relief requested by the State provided in part:

> "1. That a temporary receiver be appointed forthwith to operate said Railway upon the following terms and conditions:
>
> "A. Said receiver may operate under the presently existing contracts with the Unions including work rules.

"B. Said receiver shall collect the operating revenues (Account 501) of said Railway and pay therefrom railway operating expenses (Account 531) but not, except as necessary to preserve the property, railway tax accruals (Account 532), interest on funded debt (Account 546) or any other charge which is not a railway operating expense. Said receiver shall pay any balance of revenues over expenses remaining at the termination of his receivership over to said Railway.

"C. To borrow money to meet such expenses under the direction of this Court." (pp. 6a-7a)

Relationships between employees of a railroad and its management are governed by the terms of the Railway Labor Act. The State-appointed receiver, on October 18, 1960, actually consummated an agreement with the striking unions. A copy of that agreement and the letter of said receiver (each of which was before the United States Court of Appeals for the Second Circuit as Exhibit A to the Rutland brief) are included herein as Appendix D. At the hearing in this case on October 26, 1960 counsel for the Rutland stated:

"* * * the very first thing that this Receiver did, * * * one of the very first things * * * was to call the Chairman of the local Brotherhoods, make [16] an appointment with them, and on that very day * * * reach an agreement with them, settling this labor dispute. * * * We have not seen a copy of the settlement, we understand that they gave the unions everything that they wanted. Now, if that is true, that would mean the bankruptcy of the railroad, in a matter of 2 weeks, 2 or 3 weeks. Now, any talk that this petition is not directed to the labor dispute, I think is misleading." (pp. 29a-30a)

The State knew or was chargeable with knowledge that the relief requested in its petition for receivership was also the subject of an already pending Injunction Action in

Federal Court. This was brought out at the hearing in that Court on October 26, 1960:

> "The Court: And, you knew that the Railroad knew it, you knew that that case was coming up for hearing by me on the merits on Wednesday, or Thursday of the week in which you initiated this proceeding, [8] didn't you?
>
> "Mr. Debevoise: We knew that the case involves the labor dispute between Management and the Unions and that it was coming on before you.
>
> "The Court: So, you preferred to rush in and seize the railroad about 2 days before the dispute was set for trial on the merits here? You wanted, at all costs, apparently, to prevent this Court passing on the merits of this dispute?" (p. 25a).

It was in light of all of these facts that the Rutland had removed this proceeding by the State to the Federal Court. Its grounds for removal were clearly and succinctly stated. They included, among other things, deprivation of property without due process of law; that the petition disclosed on its face that the State action arose under the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. §1 *et seq.* and the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §151 *et seq.* and the Commerce Regulations, 62 Stat. 931, 28 U.S.C. §1337, and that there was no lawful power in the State of Vermont which could interfere with the operation of Federal law in the settlement of a railroad labor dispute. Finally, it was alleged that the State had no authority to act and that the purpose of the State receivership action was to defeat the jurisdiction of the Federal Court in the Injunction Action already pending before it.

Removal of the State receivership proceeding having been accomplished on October 19, 1960, a full hearing on the subject matter was provided for and was held on October 26, 1960. (pp. 21a-31a) At the hearing the Court indicated that it would issue a permanent injunction against the purported receivership. Before the permanent

injunction was filed, however, the same Court issued its findings of fact, conclusions of law and judgment order in the prior Injunction Action instituted by the Rutland. *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Eng., supra.* It was there held that the strike of September 16, 1960 was illegal, the operating Brotherhoods were enjoined from further striking or picketing. The injunction was and is to remain in effect until the underlying dispute is disposed of by the National Railroad Adjustment Board in accordance with the administrative procedures provided for in the Railway Labor Act. That judgment has been appealed by the Operating Brotherhoods et al., and that appeal is pending before the United States Court of Appeals for the Second Circuit.

The order of the District Court permanently enjoining the purported receivership of the defendant was filed October 28, 1960, was reversed by the Court of Appeals for the Second Circuit whose judgment was entered June 8, 1961 and is the basis for the Petitioner's prayer that a writ of certiorari issue.

Reason for Granting the Writ

Petitioner respectfully requests that a writ of certiorari issue because of the importance of the conflicting claims to jurisdictional power asserted by a Federal and State Court over the subject matter of this proceeding.

An issue raised is whether or not the decision of the Court of Appeals for the Second Circuit considered and properly interpreted all of the decisions which have an effect on the dual Federal-State jurisdictional relationships raised in this proceeding.

The Court of Appeals decision not only ignored the Federal statute which grants to a District Court the prerogative to stay State Court proceedings, 62 Stat. 968, 28 U.S.C. §2283, but it also conflicted with decisions of this Court interpreting that statute. *Capital Service Inc.* v. *Labor Board*, 347 U. S. 501 (1954) and *Clothing Workers* v. *Richman Bros.*, 348 U. S. 511 (1955). The Circuit Court's

consideration of the Removability Statute was also contrary to the decision of this Court in *Gully v. First National Bank*, 299 U. S. 109 (1936) and subsequent Federal decisions interpreting it. Furthermore, the Court below did not properly interpret *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952) which held that a Governmental agency is not empowered to seize private property in absence of statutory authority and to do so violated due process of law.

Two decisions, *Capital Services* and *Clothing Workers*, *supra*, rendered by this Court interpreting the Federal Stay of State Court Proceedings Statute illustrate why a proper consideration of that statute by the Court of Appeals would have led that Court to uphold the injunction granted by the District Court for Vermont protecting its own prior federal jurisdiction.

In the *Capital Service* case this Court resolved a Federal-State jurisdictional conflict in favor of a Federal Court which had, on request of the National Labor Relations Board, enjoined a State Court proceeding "in aid of its jurisdiction". Congress had vested that Federal agency with exclusive jurisdiction over the subject matter there involved and the intrusion of the State resulted in a conflict of jurisdiction. The Federal Court could, therefore, enjoin the State proceeding in order to preserve Federal administrative rights.

Here, the State of Vermont did not initiate its receivership action until after Petitioner itself had invoked the jurisdiction of the Federal District Court in the Injunction Action and the jurisdiction of the National Railroad Adjustment Board as well, over the same subject matter which the State sought to control through its receivership proceeding. Therefore, both the jurisdiction of a Federal agency—the National Railroad Adjustment Board and a Federal District Court had been invoked prior to the inception of the State receivership petition.

This Court, therefore, should consider whether the Court of Appeals for the Second Circuit improperly refused to consider the applicability of the Stay of State Court Proceedings Statute, 62 Stat. 968, 28 U.S.C. §2283, to the facts of this case.

In *Clothing Workers* v. *Richman Bros., supra,* a majority of this Court decided that a Federal District Court could not utilize the Stay of State Court Proceedings Statute, *supra,* to restrain a State Court's interference with the jurisdiction of the National Labor Relations Board when the claim of interference was raised by a private litigant rather than the Board itself. The Court there held that the National Labor Relations Board had been given statutory power [National Labor Relations Act, 61 Stat. 149, 29 U.S.C. §160(j)(l)] to seek injunctions from Federal Courts and, therefore, only it could request such protection for its own administrative jurisdiction. In this case, however, the National Railroad Adjustment Board established under the Railway Labor Act does not have a comparable statutory basis on which it could seek a Federal injunction prior to its issuance of an order in a controversy before it. Railway Labor Act, 48 Stat. 1192, 45 U.S.C. §153 (p). If the jurisdiction of the National Railroad Adjustment Board was to be protected here it had to be protected by this Petitioner.

The District Court for the District of Vermont issued its permanent injunction against the purported State receivership on the ground that the State in acting "without notice, without hearing, without statutory authority, * * * and in the absence of a grave emergency * * *— deprived the defendant corporation of property without due process of law. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952)." The Court of Appeals did not properly interpret this issue in its opinion.

Therefore, this Court must consider whether or not (because of the Constitutional issue and the questions of

Federal law inherent in the State receivership petition) jurisdiction existed in the Federal District Court to enjoin the State proceeding which it had already removed to itself because of the constitutional and federal questions presented therein and in aid of its own jurisdiction.

This Court has stated in *Bell* v. *Hood*, 327 U. S. 678 (1946) that it is its established practice to sustain the jurisdiction of Federal Courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the State to do.

Petitioner is a Vermont corporation engaged in interstate commerce and subject to the Railway Labor Act and other acts of Congress regulating the activities of railroads in interstate commerce. It had already invoked the jurisdiction of the District Court for the District of Vermont in the Injunction Action and the jurisdiction of the National Railroad Adjustment Board before it was faced with the State's proceeding requesting that it be forced into receivership.

The State's receivership petition arose under the "Constitution, laws or treaties of the United States" as the Removability Statute was interpreted by this Court in *Gully* v. *First National Bank*, 299 U. S. 109 (1936). There this Court indicated that removability is proper when a right or liability created by the Constitution or by the laws of the United States is such an essential element of the plaintiff's (the State's) cause of action that it will be supported if the Constitution or those laws are given one construction and effect and defeated if they receive another. That the State's receivership petition involved the Interstate Commerce Act cannot be disputed. See, for example, paragraph 12 of said petition at page 6a. The involvement of the Railroad Labor Act in this proceeding is clear, not only from a reading of the State's receivership petition, but also as a result of the action taken by the State-

appointed receiver the day after he was appointed. At that time, he actually consummated an agreement with the striking operating Brotherhoods, Appendix D hereto, which agreement settled the labor dispute on the unions' terms at a time when the position of the unions vis a vis management was already pending before both the United States District Court for the District of Vermont in the Injunction Action and the National Railroad Adjustment Board for the same reason.

This Court has stated that a railroad, even one owned and operated by a State, if engaged in interstate commerce is subjected to the commerce power of Congress. See *California* v. *Taylor*, 353 U. S. 553 (1957) at page 566:

> "* * * An extended period of congressional experimentation in the field of railway labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes. A primary purpose of this machinery of railway government is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . .' 48 Stat. 1186 (§ 2, 45 U.S.C. 151a. See *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 242. Like the Safety Appliance Act, the Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.' *United States* v. *California*, 297 U. S. 175, 186. * * *"

Clearly the Commerce Regulation, 62 Stat. 931, 28 U.S.C. 1337 applies to Petitioner.

Even if this Court should determine that Constitutional and Federal questions do not appear to be immediately obvious on the face of the State's petition for a receivership such a conclusion would not be sufficient to bar the removal of it to the Federal Court. This Court has

looked beyond the particular provisions of a complaint (here the petition) to determine whether or not they necessarily involve a question of Federal law. See *Southern Pacific Co.* v. *Stewart*, 245 U. S. 359, 362 (1917) and *Downey* v. *Geary-Wright Tobacco Co.*, 39 F. Supp. 33 (E.D. Ky., 1941) at p. 36.

In summary, this proceeding raises fundamental issues which affect our dual Federal-State system of jurisprudence and the application of it not only to this Petitioner, but also to any person or corporation engaged in interstate commerce not only as a railroad, but also in any other activities which are subject to regulation by the Congress of the United States. Can a State without authority, statutory or otherwise, seize the property of a railroad--or any other corporation—without due process of law? Is it not proper for a Federal court to protect its jurisdiction and that of a Federal agency — The National Railroad Adjustment Board — when both had jurisdiction over the subject matter of the State Court proceeding before the latter had been initiated? This situation presents a question as to how far a Federal District Court judge may go to protect his own court's jurisdiction. It also gives this Court an opportunity to clarify the proper nature of the important relationship which should exist between the jurisdiction of State and Federal courts in this important area of statutory interpretation.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 1961.

Appendix A

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 363—October Term, 1960.
(Argued May 2, 1961 Decided June 8, 1961.)
Docket No. 26721

THOMAS M. DEBEVOISE, Attorney General of the State of Vermont, and STATE OF VERMONT,

Appellants,

v.

RUTLAND RAILWAY CORPORATION,

Appellee.

Before: LUMBARD, Chief Judge,
MOORE, Circuit Judge, and STEEL,
District Judge.*

Appeal from an order of the District Court of Vermont, Ernest W. Gibson, J., enjoining the State of Vermont and its agents from running the Rutland Railway by a receivership after the case had been removed from the Rutland County Court of Chancery.

Reversed and remanded with instructions to remand to the Rutland County Court of Chancery.

*Sitting by designation.

Appendix A

THOMAS M. DEBEVOISE, Attorney General for the State of Vermont (John D. Carbine, Special Counsel for State of Vermont, on the brief), for appellants.

THOMAS WILLIAM LYNCH, Rutland, Vermont (Donald L. Wallace, New York, N. Y., Charles D Peet, Harry F. Martin, Jr., Clark, Carr & Ellis, New York, N. Y., on the brief, for appellee.

LUMBARD, Chief Judge:

The State of Vermont, by its chief legal officer, appeals from a permanent injunction entered by the United States District Court for the District of Vermont, which injunction forbade the State of Vermont to run the Vermont lines of the Rutland Railroad by way of a receivership that had been created by the Rutland County Court of Chancery on the state's petition. Vermont claims that the federal court had no power to remove the case from the state court and that therefore its injunction was a nullity. We agree.

The Rutland Railway was shut down on September 16, 1960 when its employees went out on strike. On the seventeenth of October, the State of Vermont, alleging that further interruption of railroad service would wreak havoc with the economic welfare, the health and comfort of the state and its citizens, brought an action against the railroad asking the Rutland Chancery Court to appoint a receiver until "the Railway * * * resume[s] operations under the direction of its own officials."

On the following day, the railroad successfully petitioned the district court for "removal" of the receivership from the state to the federal court and, after the case had been removed, sought and obtained, on October 19 and October

27, a temporary restraining order and a permanent injunction against "any conduct in execution of the purported receivership."[1] The court's order stated that the receivership, and the procedure by which it was granted, deprived the railway of property without due process of law.[2] This action was taken despite Vermont's vigorous attack upon the jurisdiction of the district court, which attack was formally presented by a motion made on October 25 to remand the case to the state court. At a hearing the following day, October 26, the district court denied the motion to remand.

It is clear that the district court should have granted the motion to remand and that it was without jurisdiction to take any action in the case. The parties were not of diverse citizenship and the case did not arise under "the Constitution, treaties or laws of the United States" as the removal statute, 28 U. S. C. § 1441, required. Cf. 28 U. S. C. § 1331. Under the removal statute, 28 U. S. C. § 1441(b), where there is no diversity, a defendant's power to remove turns upon whether the plaintiff's claim arises under federal law within the meaning of § 1331.[3] See Wechsler,

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1. The railroad never filed an answer to Vermont's receivership petition.

2. Immediately following issuance of the permanent injunction against the receivership, Judge Gibson enjoined the strike and referred the dispute between the railroad and the striking unions to the National Railroad Adjustment Board. *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, 188 F. Supp. 721 (D. Vt. 1960). Suing under the Railway Labor Act, the railroad had sought to enjoin the strike; the union in reply asked for an injunction directing the railroad to preserve the status quo with respect to certain proposed changes in working conditions which proposals had precipitated the strike. An appeal from this decision is now pending.

3. Section 1441(b) states that:

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of

Appendix A

Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, particularly at 233-34 (1948).

Defendant's petition for removal stated that the receivership took its property without due process of law and interfered with the allegedly exclusive federal power over railway labor disputes created by the Railroad Labor Act. Both the constitutional and the statutory defense could of course be pressed in the state courts and ultimately perhaps might be decided by the United States Supreme Court which has jurisdiction under 28 U. S. C. §1257 if federal law has been "drawn in question." Cf. *In re Winn*, 213 U. S. 458, 465 (1909). But the claims could be asserted only as a defense to Vermont's petition for the receivership and thus their existence does not meet the requirement of §1441 that the plaintiff's claim be one "arising under" federal law. It is well settled that the likelihood—even the certainty—that federal law will enter a case by way of defense does not confer jurisdiction upon the district courts. *Louisville & Nashville R.R.* v. *Mottley*, 211 U. S. 149 (1908); *In re Winn*, *supra*; see generally Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157 (1953); Hart and Wechsler, The Federal Courts and the Federal System, pp. 748-77.

Defendants also claimed that Vermont's receivership petition disclosed "that the action in the State Court arose

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the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Section 1331 states that:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

under * * * the Interstate Commerce Act." It did not; although the petition did reveal that the Rutland was an interstate railway, Vermont did not rely upon a right created by the federal statute but rather it asserted its own sovereignty.

Since the district court had no jurisdiction all proceedings taken in it were a nullity, the injunction must be vacated and the case remanded to the district court with instructions to remand the case to the Rutland County Court of Chancery.

Reversed and remanded to the district court with instructions to remand the case to the Rutland County Court of Chancery.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS M. DEBEVOISE, Attorney General of the State of Vermont, and STATE OF VERMONT,

Appellants,

against

RUTLAND RAILWAY CORPORATION,

Appellee.

ON MOTION TO STAY THE ISSUANCE OF THE MANDATE.

Motion granted.

The mandate is ordered stayed, pursuant to our Rule 28(c), for thirty days from the date of the filing of this order, and stayed thereafter if during said thirty days there is filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court of the United States that a petition for the issuance of a writ of certiorari has been filed in that Court.

L. P. M.

.....

U. S. C. J.

E. D. S.

.....

U. S. D. J.

July 11, 1961.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

PERMANENT INJUNCTION AGAINST
PURPORTED RECEIVERSHIP OF DEFENDANT

"This Court finds that the purported receivership of the defendant corporation obtained by the plaintiffs on October 17, 1960, in the Rutland County Court—without notice, without hearing, without statutory authority, without compensation, and in the absence of a grave emergency affecting the health and safety of the popalace—deprived the defendant corporation of property without due process of law. See *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Therefore, the plaintiffs and their agents are permanently enjoined from any conduct in execution of the purported receivership."

ERNEST W. GIBSON,
Ernest W. Gibson
U. S. District Judge

Dated at Brattleboro, Vermont, this 27th day of October, 1960.

Endorsed: Filed October 28, 1960

EDWARD J. TRUDELL,
Deputy Clerk

Appendix D*

LETTER OF STATE RECEIVER DATED OCTOBER 18, 1960.

October 18, 1960

TO THE REPRESENTATIVES OF THE RAILWAY BROTHERHOODS

Gentlemen:

I am Receiver of the Rutland Railway Corporation. I desire the Brotherhoods to return to work so that I may operate the Railway. I understand that the Brotherhoods are willing to return as soon as I obtain control of all the line. I am taking such legal steps as appear necessary to obtain such complete control.

In the meantime I understand that you will immediately withdraw your picket lines so I can recall to work non-operating personnel who are on furlough and cause them to place the engines in condition so that they may operate as soon as possible. It is our mutual understanding that the Brotherhoods will return to work under conditions as they existed on September 7, 1960 and that the train schedules in effect on that date will be maintained. I further agree to continue negotiations on other pending matters affecting wages. We further understand that both the Brotherhoods and the Receiver are proceeding without prejudice to their rights in Docket A 6329 before the National Mediation Board.

I further agree that we will not discriminate between or among employees in their return to work and that their

*Appeared as Exhibit A in Petitioner's brief before the United States Court of Appeals for the Second Circuit. A certified copy of that brief has been filed with the Clerk of this Court.

seniority will not be impaired because of strike activity and that we will return the men to service just as quickly as the equipment is in condition to be operated and we further agree to do everything in our power to get this equipment in shape as quickly as possible.

I acknowledge receipt of your letter of October 18, 1960 and concur in the conditions expressed therein.

Very truly yours,

CLEON PERKINS,
Receiver for
Rutland Railway Corporation.

Appendix D

AGREEMENT DATED OCTOBER 18, 1960.

October 18, 1960

Mr. Cleon Perkins, Temporary Receiver
Rutland Railway Corporation
Rutland, Vermont

Dear Sir:

We agree to instruct the employees represented by our respective Organizations to return to service on the Rutland Railroad of which you are Temporary Receiver, appointed by the Rutland County Court (sitting in Equity) as soon as you have been appointed and qualified as an Ancillary Receiver and have taken possession of, with authority to operate, the property of Rutland Railway Corporation located in the State of New York, subject to the following conditions:

1. That all bulletins respecting the abolishment and advertisement of runs posted on September 8, 1960 are removed, cancelled and made null and void, as well as any assignments thereunder.

2. That the status quo in all respects existing as of September 7, 1960 will be restored and maintained subject to the provisions of the Railway Labor Act.

3. That no employee of any craft or class of the Rutland Railway Corporation will be discriminated or recriminated against because of any alleged claim which may or might be asserted against him by Rutland Railway Corporation involving the strike now in effect on the property; that all such employees shall be returned to service with seniority right unimpaired; and that all medical examinations which may otherwise be required for such return to service will be waived.

4. That upon return of said employees to service you will meet and confer with our representatives in

good faith concerning the issues in Mediation Case No. A-6329 of the National Mediation Board.

This agreement on our part is made subject to the continued operation of the entire property of Rutland Railway Corporation by you as Receiver or your duly appointed successor.

Very truly yours,

A. S. McCarthy,
General Chairman,
Brotherhood of Locomotive Engineers.

Approved:

S. S. Thompson,
Assistant Grand Chief Engineer — Brotherhood of Locomotive Engineers

Richard Davies,
General Chairman,
Brotherhood of Locomotive Firemen and Enginemen.

M. L. Mullett,
Vice President
Brotherhood of Locomotive Firemen and Enginemen

Ellis K. Stone per R. H. Brown,
Chairman General Committee of Adjustment,
Order of Railway Conductors and Brakemen.

Geo. Rebstp,
Vice President
Order of Railway Conductors and Brakemen

Francis J. Esposito,
General Chairman,
Brotherhood of Railroad Trainmen.

W. J. Weil,
Vice President —
Brotherhood of Railway Trainmen

By S. S. Thompson

APPENDIX E

Statutes Involved

U.S.C.

28 U.S.C. § 1254. *Courts of appeals; certiorari; appeal; certified questions.*

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

28 U.S.C. § 1337. *Commerce and antitrust regulations.*

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or * * *"

28 U.S.C. § 1441. *Actions removable generally.*

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) * * *."

Appendix E

28 U.S.C. § 2101. *Supreme Court; time for appeal or certiorari; docketing; stay.*

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U.S.C. § 2283. *Stay of State court proceedings.*

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

29 U.S.C. § 160 (j) (l). *National Labor Relations Act.*

(j) "The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, * * * for appropriate temporary relief or restraining order.

(l) "Whenever it is charged that any person has engaged in an unfair labor practice * * * the preliminary investigation of such charge shall be made forthwith * * * If, after such investigation, the officer * * * has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court * * * for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter."

Appendix E

45 U.S.C. *et seq. Railway Labor Act.*

"§ 151 'First: * * * "carrier" includes * * * carrier by railroad, subject to the Interstate Commerce Act, * * *'"

§153(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner * * * may file in the District Court of the United States * * * a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises.

49 U.S.C. §1 *et seq. Interstate Commerce Act.*

"§ 1 '(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, * * *; or

(b) * * * *; or

—from one state * * * to any other State * * or from or to any place in the United States * * *'"

U. S. Constitution

Constitution of the United States, Article I, Section 8, Clause 3. Regulation of Commerce.

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Fourteenth Amendment, Section 1. Due Process of Law.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

LIBRARY
SUPREME COURT, U. S.

No. 295

SUPREME COURT, U.S.
FILED
SEP 8 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

THOMAS M. DEBEVOISE, Attorney General of the State of Vermont, and STATE OF VERMONT,

Respondents,

v.

RUTLAND RAILWAY CORPORATION,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Montpelier, Vermont

JOHN D. CARBINE,
Special Counsel for State of Vermont
Of Counsel

September 5, 1961

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IN THE

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OCTOBER TERM 1961

No. 295

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THOMAS M. DEBEVOISE, Attorney General of the State of Vermont, and STATE OF VERMONT,

Respondents,

v.

RUTLAND RAILWAY CORPORATION,

Petitioner.

.....

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The unanimous opinion of the United States Court of Appeals for the Second Circuit on the procedural issue here involved, against which decision petitioner seeks certiorari, was entered on June 8, 1961. It is as yet unreported but is set forth as Appendix A to the petition.

The Court of Appeals declared null and void the order of the District Court of Vermont dated October 28, 1960 (Appendix C to the petition) which, without evidence or hearing on the merits, had granted a permanent injunction against the respondents and a court-appointed receiver after the District Court had removed the case from the Rutland County (Vermont) Court of Chancery. The Court of Appeals further ordered the District Court to remand the case to the Rutland County Court of Chancery.

QUESTION PRESENTED

Whether this action, which was initiated by the respondents in the Rutland County (Vermont) Court of Chancery, was properly removed to the District Court of Vermont, there being (1) no diversity of citizenship and (2) the action not being founded on a claim or right arising under the Constitution, Treaties or Laws of the United States.

STATUTE INVOLVED

The petitioner cites 28 U.S.C. §2283, the statute on Stay of State Court Proceedings. No application for such a stay was made, however; nor was one granted or denied. The case was removed to the federal court and the only applicable statute is:

> Title 28, §1441, United States Code.
> §1441. *Actions removable generally.*
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interst properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) * * *.

STATEMENT

Originally chartered by the State of Vermont, the Rutland Railway Corporation is a vital and important part of the transportation system of that State. The operation of said Railway ceased at 12:01 A.M. on September 16, 1960, because of a strike.

There is no dispute that the Railway ceased to operate as the

result of a violation of law by either Railway management or Railway labor. The question —who was the law violator —must be decided under the Federal Railway Labor Act. The question is presently pending on appeal to the United States Court of Appeals for the Second Circuit in a suit to which the respondents are, of course, not privy, that suit being solely between Railway management and labor.

One month later, on October 17, 1960, the continued violation of law had already caused such injury and was threatening to cause such further damage to the people of the State of Vermont and the State of Vermont that the respondents requested the Rutland County (Vermont) Court of Chancery to restore the status quo pending the determination of the law violator by the federal courts, or some earlier action making it possible for the management of the Railroad to resume operations. Since the determination of who was violating the law was not then a question within the jurisdiction of the State, instead of seeking an injunction, the respondents petitioned the court for a similar extraordinary remedy, a receivership.

The petition for receivership set forth the grave consequences of the shutdown to the State and its people; it informed the court of the labor dispute but did not take sides therein; and it requested the court to appoint a receiver of the state chartered Railway's property within the State to operate the Railway in the interim. Once the court had located a man in whom it had confidence for the job, it granted the petition and appointed that man the receiver.

Immediately after the Rutland County Court of Chancery had appointed the receiver, the United States District Court for Vermont removed the case from the State court and, once this had been done, issued a temporary restraining order against the court-appointed receiver. Notice of hearing was given at the same time according to the federal rules of civil procedure.

One week later on October 26, 1960, the return day, the District Court issued a permanent injunction against the receiver and the respondents from doing anything except appealing. The moving party presented no evidence in support of the injunction. The respondents had moved on jurisdictional grounds that the case be remanded, which motion was denied.

The respondents had further objected to jurisdiction of the court to issue an injunction without evidence but had been overruled.

Almost immediately after the granting of the permanent injunction against the respondents and the receiver, the Railway resumed operations. For this reason, the petitioner herein moved to dismiss as moot respondents' appeal to the United States Court of Appeals. (See motion and answering affidavit in the record before the Court of Appeals.) Because there are several steps necessary to terminate the litigation and these can only be taken before a court which has proper jurisdiction, the Court of Appeals denied the motion and argument to dismiss as moot, unanimously reversed the District Court on the jurisdictional question and ordered the case remanded to the State Court where it may properly be terminated.

The only possible purpose of the present petition is to attempt to have the final steps in terminating the litigation heard before the District Judge of the District of Vermont instead of before a chancellor in the Rutland County Court of Chancery where the suit originated and where proper jurisdiction lies

ARGUMENT

A. No Substantial Question is Presented.

The petitioner, who now claims that a substantial question is presented, moved in the United States Court of Appeals for the Second Circuit to dismiss the respondents' procedural appeal as moot on the grounds that the Railway was again operating under its own management and, therefore, by terms of the original petition for receivership, the receiver was no longer necessary. Petitioner further urged at the time of argument in the Court of Appeals that the case was unique and "one of a kind" and again urged that the court need not decide the procedural issue presented because the only matter left unresolved was the termination of the litigation.

The petitioner now requests certiorari "because of the importance of the conflicting claims to jurisdictional power asserted by a federal and state court over the subject matter of this proceeding."

The petitioner constantly asserts that the subject matter of

this litigation is a labor dispute. The first statement of "Questions Presented" (Petition for Writ of Certiorari, p. 2) and the argument on pages 7 and 8 are typical of this oft repeated false assertion. There the claim is made that the State knew or was chargeable with knowledge that the relief requested was the subject of an already pending injunction action. This simply is not true. The petition for receivership at paragraph No. 9 expressly negated a request for adjudication of the labor dispute. As the Court below stated (Petition for Writ of Certiorari, 5A):

> "* * *Vermont did not rely upon a right created by the federal statute but rather it asserted its own sovereignty."

The opinion of this Court in *Gully v. First National Bank*, 299 U.S. 109 (1936), does not support petitioner's position but is squarely against it. At page 112 of 299 U.S this Court said:

> "* * *To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action* * *"

In this case neither the Constitution of the United States nor the federal statutes are essential to plaintiffs' cause. The constitutional points were raised by the petition for removal and the case does not meet the requirement of the *Gully* opinion that "the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."

A unanimous Court of Appeals held that while the District Judge did have jurisdiction over the labor dispute, he did not have jurisdiction to remove from State court a claim based on the sovereignty of the State over property located in the State and owned by a resident of the State. As to such a claim, there is no substantial question as to what court has jurisdiction.

B. There Is No Conflict In Legal Decisions Concerning This Case.

The petitioner urges a conflict of decisions. To do so it juxtaposes decisions concerning the stay of State court pro-

ceedings and decisions concerning the removability of cases from State courts. As pointed out earlier, however, no request for a stay of the State court proceedings was ever made or granted.

If there had been a stay of State court proceedings in this case, the jurisdiction to terminate the affairs of the receivership would still be in State court where the Court of Appeals says it properly lies. And the case would still be in State Court. This petition for certiorari which is simply an attempt to give jurisdiction to the District Court to wind up the affairs of the receivership would then have no purpose at all.

The cases concerning stay of State court proceedings have no applicability.

The law concerning removal of actions from State courts, as applied to the facts in this case, is so clear that instead of citing a long list of cases, the Court of Appeals cited textbooks on the point. (See Appendix A to the petition, p. 4a.)

C. The Resolution Of This Petition Has No Importance Beyond The Parties Hereto.

The petitioner urged in the lower courts that the issue involved in this petition was moot and of no importance as a guide to future litigation because the case was unique. The issue herein is strictly procedural.

Other issues which the petitioner seeks to raise concern the merits of the original petition to the Vermont court by Vermont's Attorney General and the State of Vermont. These issues have never been properly raised and therefore were never briefed or argued below. Their resolution, in the first instance, properly lies in the State court, but in any event, they are not raised herein.

The sole question presented here is who has jurisdiction to terminate a moot dispute.

CONCLUSION

For foregoing reasons. the respondents pray that the petition for certiorari be denied and that the mandate of the United States Court of Appeals for the Second Circuit issue to the United States District Court for Vermont.

Respectfully submitted,
THOMAS M. DEBEVOISE
Attorney for Respondents
Attorney General
State Library Building
Montpelier, Vermont

JOHN D. CARBINE
Special Counsel for State of Vermont
Of Counsel

September 5, 1961